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Supreme Court of the United States

October Term, 1975
No. 75-597

CHARLES F. REHOR,
Petitioner,

vs.

CASE WESTERN RESERVE UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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The Opinion of the Supreme Court of Ohio, set forth as Section A of the Appendix to the Petition, is reported at 43 Ohio St. 2d 224 (1975).

The unreported opinion of the Court of Appeals for the Eighth Appellate District of Ohio is set forth as Section B of the Appendix to the Petition.

The unreported Findings of Fact and Conclusions of Law of the Court of Common Pleas of Cuyahoga County, Ohio is set forth as Section C of the Appendix to the Petition.

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction as explained hereafter to grant this writ of certiorari under 28 U.S.C. § 1257(3).

COUNTERSTATEMENT OF THE CASE

This lawsuit is on contract and involves an interpretation of "tenure" as that term is used in employment contracts of colleges and universities. Petitioner Charles F. Rehor charged that respondent Case Western Reserve University acted improperly in retiring him at age 68 pursuant to the University's amended retirement policy. The trial court ruled in favor of respondent. The facts are not in serious dispute and are substantially as stated in the trial court's Findings of Fact and Conclusions of Law (See Appendix C to the Petition).

Respondent was organized on July 1, 1967 as successor to Case Institute of Technology and to Western Reserve University. Petitioner was employed under contracts as a professor at Western Reserve University and continued under contracts as a professor at respondent from July 1, 1967 to his retirement on June 30, 1973. Petitioner was granted tenure by Western Reserve University sometime prior to 1948. The retirement age at former Western Reserve University was 70 years of age.

Immediately upon its formation the respondent started a review of the separate policies, rules and regulations of the two former educational institutions, including their faculty retirement policies. In 1969, upon faculty recommendation, respondent amended its retirement policy by lowering the retirement age. Under respondent's amended retirement policy petitioner was to retire at age 68 rather than at age 70.

Petitioner was advised in writing at least by July 2, 1970 that his retirement would be on June 30, 1973. After being so informed petitioner signed three separate annual appointment contracts, each of which provided for an increase in salary over the prior year.

Petitioner attained 68 years of age and was retired as of June 30, 1973 under respondent's amended retirement policy. Prior to June 30, 1973 petitioner requested the appropriate University faculty committee for a recommendation that he be reappointed beyond age 68. After consideration no action was taken on that request by the committee. Also, before June 30, 1973, petitioner wrote the President of respondent University asking for reappointment beyond age 68; this request was denied.

Petitioner appealed the decision of the trial court and the Court of Appeals for the Eighth Appellate District of Ohio reversed (See Appendix B to the Petition). Respondent then requested the Supreme Court of Ohio to review the decision of the Court of Appeals because the case involved matters of general and public interest. Various educational organizations and institutions of higher education wrote letters advising the Supreme Court of Ohio of the importance of the questions presented (See Appendix F to the Petition).

The Supreme Court of Ohio accepted jurisdiction, and after briefing and oral argument reversed the decision of the Court of Appeals and entered judgment for respondent. In reaching its decision the Supreme Court of Ohio had the benefit of the parties' briefs and also three briefs amicus curiae—one in support of petitioner's position and two in support of respondent's position.

The Supreme Court of Ohio held:

1. Respondent's employment policies, rules and regulations became part of the employment contract between petitioner and respondent.

2. The grant of tenure to petitioner did not preclude respondent from thereafter making reasonable changes in its retirement age for all faculty members, including petitioner.

3. Respondent's by-laws reserved to it the right to change respondent's retirement policy.

4. The employment contract between the parties was amended by them in writing and supported by adequate consideration.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO JURISDICTION UNDER 28 U.S.C. § 1257 (3).

Petitioner asserts jurisdiction for his petition to this Court under 28 U.S.C. § 1257(3). That section provides jurisdiction if a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It will be shown below that this contract action involves no "title, right, privilege or immunity" secured by federal law. But there is a prior point—there is no jurisdiction under 28 U.S.C. § 1257(3) because petitioner never "specially set up or claimed" at any point in the courts below that any such "title, right, privilege or immunity" had been violated. This claim is made now by petitioner for the first time before this Court. As stated by Justice White:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The Supreme Court of Ohio did not discuss the federal questions now alleged in the petition. This Court has held that when the highest state court fails to pass upon a fed-

eral question it is assumed the omission was due to want of proper presentation in the state courts. *Street v. New York*, 394 U.S. 576 (1969).

However, petitioner argues the alleged federal questions were presented to the Ohio courts on two occasions. First, petitioner says he raised the federal grounds by citing *Perry v. Sindermann*, 408 U.S. 593 (1972), in his Supplemental Trial Brief (Petition at p. 7). Petitioner cited *Perry v. Sindermann* and several other cases in his Supplemental Trial Brief for the principle that a faculty handbook becomes part of a university's employment contract with its faculty members. (Respondent, by the way, agreed with this principle throughout.) But the mere citation of *Perry v. Sindermann*, which involved freedom of speech and procedural due process and did not in any way on its facts resemble this case, does not satisfy the mandate of 28 U.S.C. § 1257(3) that any federally protected "title, right, privilege or immunity" be "specially set up or claimed."

Petitioner claims the federal question was raised, secondly, by the citation of *Perry v. Sindermann, supra,* and *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) in the opinion of the Court of Appeals (Petition at pp. 7-9). As stated above, *Perry v. Sindermann* did not involve any federally protected rights relevant to petitioner's claim herein; nor did *Indiana ex rel. Anderson v. Brand*, which involved the repeal by a state legislature of a statute granting tenure to public school teachers. But of greater importance, the mere discussion of a federal question in the opinion of a state court will not satisfy the requirement of 28 U.S.C. § 1257(3) that the federal right alleged to be violated be "specially set up or claimed" by petitioner. *Howard v. Fleming*, 191 U.S. 126, 137 (1903) and *Osborne v. Clark*, 204 U.S. 565, 567-9 (1907).

Jurisdiction does not exist under 28 U.S.C. § 1257(3) because petitioner has not "specifically set up or claimed" in the Ohio courts any federal "title, right, privilege or immunity."

II. THE DECISION OF THE SUPREME COURT OF OHIO DID NOT INFRINGE UPON ANY FEDERALLY PROTECTED RIGHT OF PETITIONER.

Petitioner brought this suit claiming respondent had breached its contract with him. The trial court determined the terms of the contract and their meaning and found that respondent was not guilty of any breach. The Supreme Court of Ohio upheld the trial court's interpretation of the employment contract between the parties and also held that respondent had not breached its agreement with petitioner.

Petitioner now claims he has been deprived of rights secured under Article IV, Section 2 and under the Fifth and Fourteenth Amendments to the United States Constitution because in his view the Supreme Court of Ohio misinterpreted the contract. This is a novel, if not outlandish, position. This was a private contract not involving the State of Ohio in any way. Petitioner says the action of the Supreme Court of Ohio provides the requisite state action under the Fourteenth Amendment, citing *Shelley v. Kraemer*, 334 U.S. 1 (1948). This pushes *Shelley v. Kraemer* too far, for that case involved the protection of a fundamental right under our Constitution—the right to be free from racial discrimination. If the ruling of the Supreme Court of Ohio in this private contract case shall suffice as a violation of Fourteenth Amendment rights, then *every* private contract could be said to involve federal rights and *every* disappointed litigant in a private contract

case decided by a state court would have a right to seek redress in this Court.

It is conceivable, we suppose, that a state court's decision could so blatantly violate contractual rights that this Court would overturn the decision as being a denial of due process under the Fourteenth Amendment—similar to the way that the enforcement by a state court of a contract which blatantly violated a fundamental right was prevented by this Court in *Shelley v. Kraemer*. While such a result may be conceptually possible, petitioner cites no case, and respondent has found no case, which so holds.

Moreover, where is the error of the Supreme Court of Ohio rising to this level of judicial malfeasance? First, petitioner says the Supreme Court of Ohio was wrong in finding three annual salary increases of $500 each were adequate consideration to support a modification of the contract (Petition at p. 11). Surely a court can take a different view of the evidence than a litigant without being in bad faith.

Second, petitioner says the Supreme Court of Ohio "manifested a lack of appropriate concern for the facts of the case." (Petition at p. 9). That the Supreme Court of Ohio viewed the evidence differently than did petitioner is neither surprising nor is it proof of judicial wrongdoing. This same claim could be made by practically every litigant—successful as well as unsuccessful.

Third, petitioner says this case "was decided as a reaction to the alarm manifested by the university lobby" and that the Supreme Court of Ohio "manifested its desire to achieve its result no matter what the law may be and in spite of what the law may be." (Petition at p. 9).

This is an irresponsible accusation. Petitioner is saying that six of the seven justices of the Supreme Court of Ohio have violated their oaths of office—that they were pressured by and succumbed to the "university lobby." Where is there any basis for such a charge? Nowhere. That two briefs amicus curiae were filed in support of respondent's position while only one brief amicus curiae (of the American Association of University Professors) was filed in support of the position of petitioner does not substantiate petitioner's charge against the Supreme Court of Ohio.

In claiming a denial of federally protected rights, petitioner suggests that *Perry v. Sindermann, supra,* held tenure to be an absolute property right. This Court did not so hold. *Perry v. Sindermann* viewed tenure as a property right for the limited purpose of determining that procedural due process required that a holder of tenure at a state college be advised of the reasons for his termination. Far from being an absolute property right which the federal courts would always protect, this Court in *Perry v. Sindermann* acknowledged that tenure would not entitle a professor at a state college to continued employment but only to be advised of the reasons for his discharge.

Petitioner has not shown that his constitutional rights were violated by the Supreme Court of Ohio, and they were not.

III. THE DECISION OF THE SUPREME COURT OF OHIO DID NOT AND COULD NOT IMPAIR THE OBLIGATION OF THE PARTIES' CONTRACT.

Petitioner argues that the holding of the Supreme Court of Ohio impairs his contract with respondent in violation of Article I, Section 10 of the United States Constitution. This argument rests on the same three grounds petitioner asserts to support his Fourteenth Amendment argument. These grounds did not justify intervention by this Court under the Fourteenth Amendment, nor do they justify intervention under the contract clause of the Constitution.

But even before reaching its merits, this claim of petitioner cannot be entertained by this Court because there is no state action here as required by Article I, Section 10. As stated by this Court:

> "It has been settled by a long line of decisions that the provisions of § 10, article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall . . . *pass any* . . . *law* impairing the obligation of contracts'—plainly requires such a conclusion." (Emphasis in original). *Tidal Oil Company v. Flanagan,* 263 U.S. 444, 451 (1924).

The judgment of the Supreme Court of Ohio *cannot* be an unconstitutional impairment of the parties' contract. *Tidal Oil Company v. Flanagan, supra; Barrows v. Jackson,* 346 U.S. 249, 260 (1953).

CONCLUSION

This Court has no jurisdiction to hear this matter because no federal right of petitioner is involved, and because none was claimed in the Ohio courts. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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